

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

ROSEMARIE MCSWAIN,

Petitioner,

v.

CASE NO. 05-CV-73545-DT  
HONORABLE GERALD E. ROSEN

SUSAN DAVIS,

Respondent.

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**OPINION AND ORDER (1) GRANTING RESPONDENT'S MOTION TO DISMISS  
AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS,  
AND (2) DENYING A CERTIFICATE OF APPEALABILITY AND  
LEAVE TO PROCEED ON APPEAL *IN FORMA PAUPERIS***

Rosemarie McSwain ("Petitioner"), a state prisoner currently confined at the Huron Valley Complex Women's Facility in Ypsilanti, Michigan, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging that she is incarcerated in violation of her constitutional rights. This matter is before the Court on Respondent's motion to dismiss the petition as untimely. For the reasons set forth below, the Court grants Respondent's motion and dismisses the petition for failure to comply with the one-year statute of limitations set forth at 28 U.S.C. § 2244(d).

**I. Facts and Procedural History**

Petitioner was convicted of first-degree murder and felony firearm following a jury trial in the Kent County Circuit Court in 1988 and was sentenced to life imprisonment without the possibility of parole and a consecutive term of two years imprisonment on those convictions. Petitioner filed an appeal as of right with the Michigan Court of Appeals, which affirmed her

convictions. *People v. McSwain*, No. 115067 (Mich. Ct. App. Oct. 8, 1990). Petitioner also filed an application for leave to appeal with the Michigan Supreme Court, which was denied. *People v. McSwain*, No. 90408 (Mich. June 28, 1991).

On August 13, 1998, Petitioner filed a motion for relief from judgment with the state trial court asserting that she was incompetent to stand trial due to dissociative identity disorder. The trial court granted the motion on August 21, 2002. The prosecution appealed by leave and the Michigan Court of Appeals reversed the trial court's decision. *People v. McSwain*, 259 Mich. App. 654, 676 N.W.2d 236 (Dec. 9, 2003). Petitioner filed an application for leave to appeal with the Michigan Supreme Court, which was denied. *People v. McSwain*, 471 Mich. 877, 688 N.W.2d 499 (Sept. 16, 2004).

Petitioner dated her present petition for writ of habeas corpus on September 14, 2005. In her pleadings, Petitioner asserts that she is entitled to habeas relief because she was incompetent to stand trial due to dissociative identity disorder. Respondent filed the instant motion to dismiss on March 20, 2006 asserting that the petition fails to comply with the one-year statute of limitations applicable to federal habeas actions. Petitioner has not filed a response to the motion.

## **II. Discussion**

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2241 *et seq.*, became effective on April 24, 1996. The AEDPA governs the filing date for this action because Petitioner filed her petition after the AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA amended 28 U.S.C. § 2244 to include a one-year period of limitations for habeas petitions brought by prisoners challenging state court judgments. The revised statute provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The

limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Petitioner's convictions became final before the AEDPA's April 24, 1996 effective date. Prisoners whose convictions became final prior to the AEDPA's effective date are given a one-year grace period in which to file their federal habeas petitions. *See Abela v. Martin*, 348 F.3d 164, 167 (6<sup>th</sup> Cir. 2003). Accordingly, Petitioner was required to file her habeas petition on or before April 24, 1997, excluding any time during which a properly filed application for state post-conviction or collateral review was pending in accordance with 28 U.S.C. § 2244(d)(2).

Petitioner did not file her state court motion for relief from judgment until August, 1998. Thus, the one-year limitations period had expired well before Petitioner sought state post-conviction review. A state court post-conviction motion that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled. *See Hargrove v. Brigano*, 300 F.3d 717, 718 n. 1 (6<sup>th</sup> Cir. 2002); *Webster v. Moore*, 199 F.3d

1256, 1259 (11<sup>th</sup> Cir. 2000); *see also Jurado v. Burt*, 337 F.3d 638, 641 (6<sup>th</sup> Cir. 2003).

Petitioner's state post-conviction proceedings did not toll the running of the statute of limitations. Furthermore, the AEDPA's limitations period does not begin to run anew after the completion of state post-conviction proceedings. *See Searcy v. Carter*, 246 F.3d 515, 519 (6<sup>th</sup> Cir. 2001).

Petitioner does not allege that the state created an impediment to the filing of her habeas petition or that her claims are based upon newly-discovered facts or newly-recognized constitutional rights. Moreover, even if asserted, Petitioner cannot establish that her habeas claim is based upon newly-discovered facts. In such a case, the limitations period begins when the factual predicate for a petitioner's claim could have been discovered through the exercise of due diligence, not when it was actually discovered by the petitioner. *See Brooks v. McKee*, 307 F. Supp. 2d 902, 905-06 (E.D. Mich. 2004) (citing cases). Additionally, the time commences when the petitioner knows or through due diligence could have discovered the important facts for the claim, not when the petitioner recognizes the facts' legal significance. *Id.* The start of the limitations period does not await the collection of evidence to support those facts. *Id.* In this case, the record indicates that Petitioner and/or her counsel were aware of facts which could have supported a mental incompetency defense at the time of trial. *See McSwain*, 259 Mich. App. at 687. Additionally, Petitioner may have known or could have reasonably discovered her potential mental illness prior to the expiration of the one-year limitations period. The possible fact of Petitioner's mental illness is therefore not newly-discovered. Her habeas action is thus barred by the statute of limitations set forth at 28 U.S.C. § 2244(d).

The United States Court of Appeals for the Sixth Circuit has determined that the one-year limitations period is not a jurisdictional bar and is subject to equitable tolling. In *Dunlap v.*

*United States*, 250 F.3d 1001, 1008-09 (6<sup>th</sup> Cir. 2001), the Sixth Circuit ruled that the test to determine whether equitable tolling of the habeas limitations period is appropriate is the five-part test set forth in *Andrews v. Orr*, 851 F.2d 146 (6<sup>th</sup> Cir. 1988). The five parts of this test are:

(1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim.

*Dunlap*, 250 F.3d at 1008. A petitioner has the burden of demonstrating that she is entitled to equitable tolling. *See Griffin v. Rogers*, 308 F.3d 647, 653 (6<sup>th</sup> Cir. 2002). "Typically, equitable tolling applied only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Jurado v. Burt*, 337 F.3d at 642 (quoting *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560 (6<sup>th</sup> Cir. 2000)).

Petitioner sets forth no circumstances which caused her to institute her state court collateral proceedings after the expiration of the one-year limitations period. The fact that Petitioner is untrained in the law, was proceeding without a lawyer, or may have been unaware of the statute of limitations for a certain period does not warrant tolling. *See Allen v. Yukins*, 366 F.3d 396, 403 (6<sup>th</sup> Cir. 2004) (ignorance of the law does not justify tolling); *Holloway v. Jones*, 166 F. Supp. 2d 1185, 1189 (E.D. Mich. 2001) (lack of professional legal assistance does not justify tolling); *Sperling v. White*, 30 F. Supp. 2d 1246, 1254 (C.D. Cal. 1998) (citing cases establishing that ignorance of the law, illiteracy, and lack of legal assistance do not justify tolling). Additionally, a petitioner's possible mental incompetence is not a *per se* reason to toll the statute of limitations for filing a federal habeas petition. *See Brown v. McKee*, 232 F. Supp. 2d 761, 767-68 (E.D. Mich. 2002). Rather, the alleged mental incompetence must somehow

have affected the petitioner's ability to timely file a habeas petition. *Id.* (citing cases). The petitioner bears the burden of showing that mental health problems rendered her unable to file a habeas petition within the one-year limitations period. *Id.* Petitioner has made no such showing.

The Sixth Circuit has recently held that a credible claim of actual innocence may equitably toll the one-year statute of limitations set forth at 28 U.S.C. § 2244(d)(1). *See Souter v. Jones*, 395 F.3d 577, 588-90 (6<sup>th</sup> Cir. 2005); *see also Holloway*, 166 F. Supp. 2d at 1190. As explained in *Souter, supra*, to support a claim of actual innocence, a petitioner in a collateral proceeding "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995)). A valid claim of actual innocence requires a petitioner "to support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness account, or critical physical evidence--that was not presented at trial." *Schlup*, 513 U.S. at 324. Furthermore, actual innocence means "factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. Petitioner has neither alleged nor established that she is actually innocent. She has thus failed to demonstrate that she is entitled to equitable tolling of the one-year period.

### **III. Conclusion**

Based on the foregoing analysis, the Court concludes that Petitioner failed to file her habeas petition within the one-year limitations period established by 28 U.S.C. § 2244(d) and that the statute of limitations precludes federal review of the petition.

Before Petitioner may appeal this Court's dispositive decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). A certificate of

appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a federal district court denies a habeas claim on procedural grounds without addressing the claim’s merits, a certificate of appealability should issue, and an appeal of the district court’s order may be taken, if the petitioner shows that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). When a plain procedural bar is present and the district court is correct to invoke it to dispose of the matter, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed. In such a case, no appeal is warranted. *Id.*

This Court is satisfied that jurists of reason could not find this Court’s procedural ruling debatable. No certificate of appealability is warranted in this case nor should Petitioner be granted leave to proceed on appeal *in forma pauperis*. *See* Fed. R. App. P. 24(a).

Accordingly,

**IT IS ORDERED** that the petition for writ of habeas corpus is **DISMISSED WITH PREJUDICE**.

**IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED** and leave to proceed on appeal *in forma pauperis* is **DENIED**.

s/Gerald E. Rosen  
Gerald E. Rosen  
United States District Judge

Dated: May 23, 2006

I hereby certify that a copy of the foregoing document was served upon counsel of record on May 23, 2006, by electronic and/or ordinary mail.

s/LaShawn R. Saulsberry

Case Manager